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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE TIMES-PICAYUNE PUBLISHING CORP., *et al.*
Petitioners,

v.

EDWIN W. EDWARDS, *et al.*,
Respondents.

On Petition for a Writ of *Certiorari* to the United States Court of Appeals for the Fifth Circuit

BRIEF OF *AMICI CURIAE* THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, THE AMERICAN SOCIETY OF NEWSPAPER EDITORS, THE ASSOCIATED PRESS, THE NATIONAL ASSOCIATION OF BROADCASTERS, AND THE RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION IN SUPPORT OF THE PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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INTERESTS OF AMICI CURIAE

The news organizations filing this brief have a vital interest in the outcome of this case. If the decision below is allowed to stand, the news media's ability to gather the news will be

severely impaired. Under the Fifth Circuit's decision, proceedings involving juror corruption in criminal trials will be presumptively closed even in cases of vital public interest, and the amici will generally be denied any reasonable opportunity even to find out that such proceedings occurred until well after the trials are completed.[1/]

The Reporters Committee for Freedom of the Press is a voluntary, unincorporated association of news reporters and editors dedicated to protecting the First Amendment interests of the news media. The Reporters Committee has appeared in virtually every Supreme Court case involving the First Amendment rights

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1/ This amicus brief is being filed with the consent of all parties. See Letter of William Jeffress, Jr.; Letter of Jack Weiss; Letter of Michael Fawer.

of reporters to gather and disseminate news and information. It has provided representation, information, legal guidance or research in virtually every major press freedoms case litigated since 1970.

The American Society of Newspaper Editors is a nationwide, professional organization of more than 950 persons who hold positions as directing editors of daily newspapers throughout the United States.

The Associated Press, the world's largest newsgathering organization, is a mutual news cooperative organized under the Not-for-Profit Corporation Law of the State of New York. The Associated Press gathers and distributes news of local, national and international importance to its member newspapers and broadcast stations across the United States and throughout the world.

The National Association of Broadcasters is a non-profit, incorporated association of more than 5,000 radio stations, 940 television stations, and the major commercial broadcast networks.

The Radio-Television News Directors Association is a professional association of electronic journalists. The Association has over 2,500 members who gather, edit and disseminate news and other public affairs information carried by the national networks, local radio and television broadcast stations and cable television systems throughout the nation.

STATEMENT OF THE CASE

Amici adopt Petitioners' Statement of the Case.

REASONS FOR GRANTING THE WRIT

By closing two mid-trial hearings concerning suspected jury tampering and misconduct during the criminal

racketeering trial of Louisiana's incumbent governor, the trial judge prevented the public and the news media from ascertaining, until weeks after the verdict, whether the jury was fair and impartial and whether the tampering and misconduct charges were properly investigated and resolved. The Court of Appeals affirmed, concluding that "for first amendment purposes, no presumption of openness attaches to proceedings involving the midtrial questioning of jurors" (App. 12a) and that the First Amendment allows access to be automatically delayed until after trial and to be routinely limited to portions of the cold transcript.

The First Amendment, however, guarantees contemporaneous public scrutiny of criminal trials and thereby ensures their integrity and judicial accountability. As this Court has stated, "the knowledge that every criminal trial is

subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power."[2/] This value underlies the consistent holdings of this Court and the other Courts of Appeals that the right of access to criminal trial proceedings is vital to assure that such proceedings are conducted fairly in fact and appearance, that the public can "serve as a check upon the judicial process -- an essential

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2/ In re Oliver, 333 U.S. 257, 270 (1948) (emphasis added). See Bridges v. California, 314 U.S. 252, 268 (1941) ("public interest is much more likely to be kindled by a controversial event of the day than by a generalization, however penetrating, of the historian or scientist."); Carroll v. President and Commissioners of Princess Anne, 393 U.S. 175, 182 (1968), quoting A Quantity of Copies of Books v. Kansas, 378 U.S. 205, 224 (1964) ("It is vital to the operation of democratic government that the citizens have facts and ideas on important issues before them. A delay of even a day or two many be of crucial importance in some instances.").

component in our structure of self-government," and that adjudications are not based on secret bias or corruption.[3/]

Even the decision below acknowledges that "[t]he issue of potential juror misconduct goes to the very heart of public confidence in the fairness or appearance of fairness in judicial proceedings." App. 10a. It recognizes that "[o]nce the spectre of a tainted jury is raised, public scrutiny of the resolution

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3/ Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982); Richmond Newspapers v. Virginia, 448 U.S. 555, 570 (1980) (plurality opinion). Moreover, when their impartiality has been put at issue, jurors in the Fifth Circuit will now be questioned behind closed doors, without the incentive to truthfulness provided by public testimony. Contrary to the Fifth Circuit's speculation (App. 11a-12a), public proceedings are generally more likely to improve than to worsen the quality of testimony. Globe Newspaper, 457 U.S. at 610 n.26.

of the issue is essential, especially when, as here, the jury acquits." Id.

It is for precisely these reasons that "the presumption of access normally involves a right of contemporaneous access[.]"[4/] Contrary to the Fifth Circuit's approach, First Amendment freedom does not bear "an inverse ratio to the timeliness and importance of the ideas seeking expression."[5/] By its paradoxical holding that the First Amendment creates a presumption in favor of delayed but not contemporaneous access to hearings on

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4/ Matter of Continental Illinois Securities Litigation, 732 F.2d 1302, 1310 (7th Cir. 1984) (emphasis in original). Continental Illinois involves a civil case, but its holding applies a fortiori to criminal trials. See also Associated Press v. United States District Court, 705 F.2d 1143, 1147 & n.3 (9th Cir. 1983) (holding unconstitutional a 48-hour delay in access to pretrial criminal hearing).

5/ Bridges v. California, 314 U.S. at 269.

juror misconduct, the decision below undermines these values and turns this Court's decisions on their head.

Abandoning the presumption of contemporaneous access, along with its requirement of a pre-closure notice and hearing, creates a presumption of closure and in fact guarantees closure as a practical matter. The decision below allows mid-trial proceedings concerning jury tampering and juror misconduct to be automatically closed without any justification, much less the constitutionally-required "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values[.]'"[6/]

6/ Press-Enterprise Co. v. Superior Court, 106 S. Ct. 2735, 2743 (1986) (citation omitted). Although it purported to preserve judicial discretion to decide whether probes of suspected juror misconduct ought to be public or secret (Footnote Continued)

Without reasonable notice of potential closure, the public and press are denied any effective opportunity to contest requests for secret proceedings. The lack of pre-closure notice and hearing creates a substantial risk that the public will not even suspect that the integrity of the jury has been questioned, or that it has been shut out of significant proceedings.7/

(Footnote Continued)

(App. 10a-11a), the Court of Appeals in effect decided that the trial court need not exercise any judgment at all before closing these proceedings. Neither precedent, empirical evidence, nor logic suggests that any compelling interests cannot be protected here, as in other trial proceedings, through closure on a case-by-case basis consistent with strict First Amendment standards.

7/ Here, the public was deprived any opportunity to learn of the existence of serious charges until after the trial ended with the jury's verdict of acquittal. Apparently deliberately, the district court's opaque descriptions of the sealed proceedings gave no hint about

(Footnote Continued)

To avoid these kinds of problems, "individualized determinations are always required before the right of access may be denied."[8/] To ensure a proper adjudication of the need for closure of criminal proceedings, six other Circuits have required not only a case-by-case determination but also reasonable notice of potential closure and a pre-closure hearing.[9/] The Fifth Circuit is the first to hold otherwise.

(Footnote Continued)

the gravity of the allegations explored at the secret hearing. See Order, United States v. Edwards, Criminal No. 85-0078 (E.D. La. April 17, 1986) (App. 22a); Order, United States v. Edwards, Criminal No. 85-0078 (E.D. La. April 22, 1986) (App. 24a).

8/ Globe Newspaper, 457 U.S. at 609 n.20 (emphasis in original and supplied); see id. at 609 n.25.

9/ In re Globe Newspaper Co., 729 F.2d 47, 56 (1st Cir. 1984); United States v. Raffoul, 826 F.2d 218, 226 (3rd Cir. 1987); United States v. Criden, 675 F.2d

(Footnote Continued)

In sum, using reasoning that could apply to a range of hearings regularly conducted during criminal trials, the Fifth Circuit has created an open-ended exemption from the First Amendment's requirement that substantive proceedings in criminal trials be closed, if at all, only after a case-by-case determination of the need for closure and after public notice and opportunity to be heard. This Court should review this fundamentally unsound decision in order to reassert the substantive and procedural protections

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(Footnote Continued)

550, 557-60 (3rd Cir. 1982); In re Washington Post Co., 807 F.2d 383, 390 (4th Cir. 1986); In re Knight Publishing Co., 743 F.2d 231, 234 (4th Cir. 1984); In re Iowa Freedom of Information Council, 724 F.2d 658, 661, 664 (8th Cir. 1984); United States v. Brooklier, 685 F.2d 1162, 1168 (9th Cir. 1982); Sacramento Bee v. United States District Court for the Eastern District of California, 656 F.2d 477, 482 (9th Cir. 1981), cert. denied 456 U.S. 983 (1982); Newman v. Graddick, 696 F.2d 796, 802 (11th Cir. 1983).

embodied in the First Amendment right of contemporaneous access.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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I, Anthony C. Epstein, counsel of record for amici and a member of the Bar of this Court, hereby certify that three copies of Brief of Amici Curiae in Support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were deposited in a mailbox, with first class postage prepaid, addressed to each of the following counsel for the parties:

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